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83-1195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

49ER CHEVROLET, RICHARD E. WILMSHURST, NEW MOTOR VEHICLE BOARD, NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC. and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC.,

Petitioners,

v.

CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

California's Vehicle Code prohibits a new car manufacturer from terminating a franchisee unless the manufacturer proves in an adjudicatory hearing that the dealer's performance was inadequate and therefore gave the manufacturer "good cause" for termination. Cal. Vehicle Code §§ 3060, 3066. The body which adjudicates that issue is the nine-member New Motor Vehicle Board ("Board"), which is required by law to have no manufacturer members but to have four members who are themselves dealers, and whose own franchises can be terminated only for "good cause". Cal. Vehicle Code §§ 3000, 3001. Under the statute, the dealer members fully participate in the adjudicatory decision making process, except they cannot formally vote. Cal. Vehicle Code §§ 3050(d), 3066(d). The trial court held that on the facts of this case, the Board lacked jurisdiction to act under the statute, and the Board dismissed the administrative proceedings solely on that ground. The trial court also held that the statute violated the manufacturers' California and federal due process rights. The court of appeal affirmed on the constitutional ground.

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(3) where dispositive, nonconstitutional state court rulings exist and where the constitutional ruling was made under state law and not under the federal constitution?

2. If jurisdiction exists, should it be exercised here, where the underlying constitutional principles are undisputed and petitioners' only complaint concerns the California courts' application of them to this particular adjudicatory scheme?

3. Do the Board's dealer members, whose own franchises can be terminated under the Vehicle Code only for "good cause", have an economic stake in adjudications which determine what constitutes "good cause"?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
1. The Facts of This Case	1
2. The Related Litigation	3
3. The History of the Statute	3
SUMMARY OF ARGUMENT	4
REASONS FOR DENYING THE WRIT	5
I. IT IS UNLIKELY THAT ANY CONSTITUTIONAL ISSUE WILL CONTINUE TO EXIST	5
II. THE DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND	6
III. THE CONSTITUTIONAL ISSUE RAISES NO QUESTION WORTHY OF THIS COURT'S REVIEW	9
A. The Holding That The Dealer Members Have An Economic Stake	10
1. Issue previously decided	11
2. No impact beyond this Board	11
3. Decision clearly correct	13
B. Nonvoting Participation By Those With An Interest Violates Due Process	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	PAGES
12319 Corporation v. *Business License Comm'n*, 137 Cal. App. 3d 54 (1982)	6
American Motors Sales Corp. v. *New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977)	*passim*
Andrews v. *Agricultural Labor Relations Board*, 28 Cal. 3d 781 (1981)	2, 8, 9, 10
Applebaum v. *Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d 648 (1980)	10, 16
Chevrolet Motor Division v. *New Motor Vehicle Board*, 146 Cal. App. 3d 533 (1983)	*passim*
Commission on California State Government Organization & Economy v. *Fair Political Practices Committee*, 75 Cal. App. 3d 716 (1977)	16
Committee to Defend Reproductive Rights v. *Myers*, 29 Cal. 3d 252 (1981)	7
Concerned Citizens v. *Pine Creek District*, 429 U.S. 651 (1977)	12-13
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961)	6
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	6
Ford Motor Co. v. *Pace*, 335 S.W.2d 360 (Tenn.), *app. dismissed, Ford Motor Co.* v. *Pace*, 364 U.S. 444 (1960)	12
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935)	6
Friedman v. *Rogers*, 440 U.S. 1 (1979)	8, 9, 12, 14
General GMC Trucks, Inc. v. *General Motors Corp.*, 237 S.E.2d 94, *cert. denied*, 434 U.S. 966 (Ga. 1977)	12
General Motors Corp. v. *Capitol Chevrolet Co.*, 645 S.W.2d 230 (Tenn. 1983)	12
Gibson v. *Berryhill*, 411 U.S. 564 (1973)	9, 10, 13
Graham v. *Scissor-Tail, Inc.*, 28 Cal. 3d 807 (1981)	8
Hope v. *Superior Court*, 122 Cal. App. 3d 147 (1981), *cert. denied sub nom., Shearson Hayden Stone, Inc.* v. *Hope*, 456 U.S. 910 (1982)	8
Hortonville District v. *Hortonville Association*, 426 U.S. 482 (1976)	8, 9, 14, 15
Jankovich v. *Toll Road Commission*, 379 U.S. 487 (1964)	6
Lopez v. *Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974)	15
Mandel v. *Hodges*, 54 Cal. App. 3d 596 (1976)	7
Moles v. *The Regents of the University of California*, 32 Cal. 3d 867 (1982)	16
New Motor Vehicle Board v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978)	14
Overlook Nursing Home, Inc. v. *United States*, 556 F.2d 500 (Ct. Cl. 1977)	15

CASES	PAGES
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1932)	10
Smith v. *Phillips*, 455 U.S. 209 (1982)	15
Wall v. *American Optometric Ass'n*, 379 F.Supp. 175 (N.D. Ga.), *aff'd summarily sub nom., Wall* v. *Hardwick*, 419 U.S. 888 (1974)	9, 13, 14
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972)	9
Withrow v. *Larkin*, 421 U.S. 35 (1975)	8, 9, 14, 15
Witt v. *Union Oil Co.*, 99 Cal. App. 3d 435 (1979)	2
Wolkenstein v. *Reville*, 694 F.2d 35 (2d Cir. 1982), *cert. denied, Wolkenstein* v. *Reville*, 103 S. Ct. 2452 (1983)	15

CONSTITUTION	
Cal. Const., Art. I, § 24	7

STATUTES	
28 U.S.C. § 1257	i, 6
Cal. Stats. 1979, Ch. 340	
§ 2	4
§ 3	4, 15
Cal. Stats. 1977, Ch. 278	
§ 2	4
§ 3	4
California Administrative Code, Title 13, Section 551	9
California Vehicle Code	
Section 3000	i, 3
Section 3001	i, 3
Section 3050	i, 4
Section 3060	i, 1, 2, 14
Section 3062	14
Section 3066	i, 2, 4
Tennessee Code Annotated, § 55-17-114	12

RULE	
United States Supreme Court Rule 17.1	10

MISCELLANEOUS	
J. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Cal. L. Rev. 273 (1973)	7
Senate Transportation Committee Analysis of S.B. 417 (1979)	15
Assembly Transportation Committee Analysis of S.B. 417 (1979)	15

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CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. ***The Facts of this Case.***

This dispute involves a decision by respondent, Chevrolet Motor Division, General Motors Corporation ("Chevrolet"), not to offer petitioner, 49er Chevrolet, Inc. ("49er") a new automobile franchise when the old five-year agreement expired by its terms. 49er protested that decision to California's New Motor Vehicle Board ("Board") under Section 3060 of the California Vehicle Code. (Board Pet., p. A-3) That section,

where applicable, prevents a manufacturer from terminating an existing dealer until after the Board holds an adjudicatory hearing and determines that the manufacturer had "good cause" for its action. Sections 3060(a), 3066.[1]

The Board held a hearing and sustained 49er's protest. Chevrolet petitioned the Superior Court for the City and County of San Francisco for judicial review. 49er's trade associations, the Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc. ("Intervenors") intervened as parties.

The superior court set the Board's decision aside. Specifically, the superior court followed *Witt v. Union Oil Co.*, 99 Cal. App. 3d 435 (1979) and held that Section 3060 did not apply because 49er's franchise had expired by its terms and the Board therefore lacked statutory jurisdiction. (Board Pet., p. A-3) The superior court also followed another California decision, *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977), and held that the statute violated Chevrolet's California and federal due process rights because it permitted those with an economic stake in the outcome to participate in the adjudicatory decision making process. (Board Pet., pp. A-13, A-14) In reaching the latter conclusion, the superior court addressed, and rejected, petitioners' contention that *American Motors* had been overruled by another California decision—*Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781 (1981). (Board Pet., p. A-15)

49er, the Board and Intervenors appealed. The court of appeal affirmed, again holding that *American Motors* laid down the law in California and that *American Motors* had not been overruled by *Andrews*. (Board Pet., pp. A-4 through A-10; 146 Cal. App. 3d at 537-40) In the light of its constitutional ruling, the court did not reach the superior court's jurisdictional ruling. (Board Pet., p. A-11; 146 Cal. App. 3d at 541) The California Supreme Court denied a hearing, with no justice voting for a hearing. (Board Pet., p. A-1)

Following the finality of the court of appeal's decision and further proceedings in the superior court, the Board set its prior decision aside and dismissed 49er's protest, solely on the

[1] Unless otherwise indicated, all section references are to the California Vehicle Code.

jurisdictional ground. (Appendix, p. A-1) 49er then filed a new proceeding in the court of appeal and asked that court to review the Board's jurisdictional ruling. The court of appeal refused to stay the Board's decision pending review of it, and directed 49er to advise it as to the outcome of other litigation between the parties. (Appendix, p. A-2) We turn to that other litigation next.

2. *The Related Litigation.*

Petitioners present this case in a vacuum. They do not mention other related litigation between the parties. That litigation does not rest on the constitutional or jurisdictional rulings involved here, but holds, following two adjudicatory hearings, that Chevrolet's decision to cease business relations with 49er was right on the merits because it was based on "good cause". The related litigation independently establishes the correctness of Chevrolet's action, and it therefore bears on whether this is an appropriate case for Supreme Court review. The facts of that related litigation are these:

Following the Board's decision in this case, 49er continued to engage in a course of conduct, including a virtual cessation of selling Chevrolet vehicles, which warranted its termination as a Chevrolet dealer. Accordingly, on September 18, 1981, Chevrolet notified 49er that commencing November 30, 1981, it would cease business relations with 49er.

49er protested that decision to the Board. The Board held a hearing on that second protest and overruled it, specifically holding on the merits that Chevrolet had "good cause" for its action. (Decision in Protest No. PR-348-82, pp. 17-18)

49er petitioned the Calaveras County Superior Court for judicial review. That court held a second adjudicatory hearing, applied its independent judgment and upheld the Board on all counts. (Statement of Decision in Calaveras County Action No. 11169, filed September 19, 1983) 49er appealed to California's Court of Appeal for the Third District, and that appeal is now pending.

3. *The History of the Statute.*

The Board is a nine member body. It is required by law to be made up of four new car dealers, five "public" members and no manufacturers. Sections 3000, 3001. One of the Board's

primary jobs is to adjudicate manufacturer-dealer disputes, including disputes over whether the manufacturer has demonstrated that the dealer's inadequate performance as a franchisee constitutes "good cause" for its termination.

As originally enacted, California's statute allowed all nine Board members to vote in dealer termination cases. That scheme was declared unconstitutional nearly seven years ago in *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

The Board did not ask this Court to review that state court decision. Instead, the legislature amended the statute to eliminate dealer participation. Cal. Stats. 1977, Ch. 278, §§ 3, 2. But two years later, the legislature again amended the statute so that dealer participation was reintroduced. As it stood at the time of the decision below, the statute provided:

> "A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a [dealer] protest filed pursuant to this article." Cal. Stats. 1979, Ch. 340, § 2; Vehicle Code §§ 3050(d), 3066(d).

The 1979 amendment was adopted as an urgency measure because it was deemed necessary for the "educated and needed advice" of the dealer members, held biased by *American Motors*, to be "utilized in the decision making process of the board." Cal. Stats. 1979, Ch. 340, § 3.

In this case the dealer members did in fact participate in the decision making process. (CT 184)

SUMMARY OF ARGUMENT

This case is not a Supreme Court case, regardless of how one views the constitutional ruling below. That is so because the superior court also held that the Board lacked statutory jurisdiction—an issue admittedly not before the Court (Board Pet., p. 4)—and 49er's protest was dismissed solely on that basis. (Appendix, p. A-1) That jurisdictional ruling has not been overturned by the court of appeal, and the two adjudicatory rulings upholding Chevrolet's action on the merits are now

pending before another court of appeal. In the light of those other dispositive rulings, it is unlikely that the constitutional issue will continue even to exist. (Part I, below)

Moreover, despite petitioners' considerable efforts to portray the decision below as raising a federal question, it does not do so, but rests squarely on California law. In fact, the court's opinion cites just one federal authority, and then only to distinguish it. (Part II, below)

Finally, even if the court of appeal had decided a federal question, there still would be no issue worthy of this Court's review. This Court has fully considered the relevant due process requirements, and this case presents no occasion to revisit that territory. The controlling principles of law are clear, and the petitions do not claim otherwise. They just object to the court of appeal's application of them to this particular California Board and statute—an issue which, even in California, lacked sufficient significance to warrant further judicial review. (Part III, below)

REASONS FOR DENYING THE WRIT

I. IT IS UNLIKELY THAT ANY CONSTITUTIONAL ISSUE WILL CONTINUE TO EXIST.

The bottom line of this case is whether Chevrolet should be prevented by the Board from giving effect to Chevrolet's decision not to offer 49er a new franchise agreement when the old agreement expired according to its terms. The superior court held that the Board could not prevent Chevrolet from so acting because it lacked statutory jurisdiction, and the Board's dismissal of 49er's protest rests solely on that state law ground. (Appendix, p. A-1)

Moreover, the propriety of Chevrolet's decision is also established by other litigation between the parties. In 1981 Chevrolet decided to stop dealing with 49er because of 49er's conduct subsequent to the Board's hearing in this case. The Board reviewed that decision and approved it on the merits, finding that it was based on "good cause." (Board Decision in Protest No. PR-348-81, pp. 16-19) The Superior Court for the County of Calaveras independently reviewed the evidence, and it, too, upheld Chevrolet's decision as being based on "good

cause." (Statement of Decision in Calaveras County No. 11169, filed September 19, 1983) That decision is now pending before the California Court of Appeal for the Third District.

Neither of those state law decisions is before the Court. One establishes that the Board lacked statutory jurisdiction, and the other that Chevrolet's decision was entirely fair and proper because based on "good cause." Each constitutes an independent termination of this dispute without regard to the constitutional ruling made by the court below.

Thus this case presents no issue at all on which the Court could act unless two other state court decisions are overturned. More particularly, the due process issue decided below would continue to be alive only if 49er were successful in overturning the San Francisco Superior Court's jurisdictional ruling *and* the Board's merits decision which the Calaveras County Superior Court has independently reviewed and upheld.[2] This Court certainly should not grant a petition in a case like this in which the Court's ability to decide the purportedly raised issue is so doubtful. See *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (Constitutional issue moot where specific dispute resolved on other grounds prior to Supreme Court decision).

II. THE DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court has jurisdiction to review state court decisions only where federal questions are involved. 28 U.S.C. § 1257. Accordingly, this Court has long held that it will not review a state court judgment which rests on an adequate and independent state ground. See, *e.g.*, *Jankovich v. Toll Road Commission*, 379 U.S. 487, 489 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281 (1961); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

[2] Where, as in the related litigation, the superior court has applied its independent judgment and upheld the agency's adjudicatory decision, the appellate court's power as to the sufficiency of the evidence "begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding [of] fact." *12319 Corporation v. Business License Comm'n*, 137 Cal. App. 3d 54, 64 (1982).

Petitioners labor long and hard to eliminate the California constitution and the California courts' reliance on it. *American Motors*, 69 Cal. App. 3d at 985; Board Pet., pp. A-13, A-14. Thus we are told that California law is "nonexistent", and that the California courts' citation to the state constitution is "meaningless", that it "merely mimicked" counsel's citation of it, and that its use was intended by the court as a "gambit" to "immunize" its decision from review by this Court. (Intervenors Pet., p. 8) But petitioners' attempts are in vain and their attacks on the lower courts' motives are spurious. The decision below rests on the California constitution; there can be no doubt about that.[3]

First, "[t]he California Supreme Court has long regarded the Declaration of Rights of the California constitution [Article I, which includes the due process clause] as a charter of independent significance." J. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Cal. L. Rev. 273, 277 (1973). The petitioners agree. The Board found one California Supreme Court case saying that the California Declaration of Rights is independent; Intervenors concede that there are at least four. (Intervenors Pet., p. 7) See also *Mandel v. Hodges*, 54 Cal. App. 3d 596, 616 (1976); *Committee to Defend Reproductive Rights* v. *Myers*, 29 Cal. 3d 252, 261 (1981). In fact, the California constitution itself makes clear that "Rights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I, § 24.

Second, the court of appeal's opinion cites just one federal case, and then only to distinguish it. (Board Pet., p. A-10; 146 Cal. App. 3d at 540) Given that, it is plain from the opinion itself that the lower court was relying on independent state grounds and was not deciding a federal issue.

Petitioners try to get around that inherent obstacle by arguing that because the California precedent, *American Motors*, cited federal cases, the decision below must be deemed to have been made under compulsion of federal law because it cites *American Motors*. (Board Pet., pp. 5-6; Intervenors Pet.,

[3] Indeed, the Board's petition cites the California due process clause as being involved in the issues it raises, and that is the *only* constitutional provision the Intervenors cite. (Board Pet., p. 3; Intervenors Pet., p. 2)

pp. 5-8) But it is only the decision in this case, not *American Motors*, which could possibly be subject to review by this Court, and petitioners' position is therefore a bootstrap argument at best.

Third, petitioners fail to point out that recent California authority, which was cited to the court of appeal, compels the conclusion that the dealer members have an economic stake in dealer termination cases which renders their participation fundamentally unfair under California law. In *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807 (1981), the California Supreme Court held that an arbitration clause requiring a concert promoter to submit disputes with a performer to the board of the performer's union does not provide an adjudication with "minimum levels of integrity" and therefore was unconscionable and unenforceable. 28 Cal. 3d at 826-27. The court reasoned that the union's board was an entity "whose interests are so allied with those of the party that, for all practical purposes, [it] is subject to the same disabilities which prevent the party himself from serving" as an adjudicator. 28 Cal. 3d at 827. See also *Hope v. Superior Court*, 122 Cal. App. 3d 147 (1981), *cert. denied sub nom., Shearson Hayden Stone, Inc. v. Hope*, 456 U.S. 910 (1982). Thus, the dealer members' economic interest is established by California law. That should put an end to this case because the constitutional principle preventing those with an economic interest from being adjudicators is unquestioned and unquestionable.

Finally, there can be no doubt that the court below was deciding a state law issue when its decison is read in the light of the arguments which petitioners made to that court. Although Intervenors, alone, made the same federal arguments to that court which they make here (Intervenors Op. Br., pp. 7-9)[4], all of the petitioners, including Intervenors, relied heavily on the

[4] 49er's briefs to the court below did not even mention *Friedman v. Rogers*, 440 U.S. 1 (1979); *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976); or *Withrow v. Larkin*, 421 U.S. 35 (1975), the principal cases on which petitioners rely here. The Board's brief mentioned only *Withrow* but then only in passing and only as further support for its state law argument based on *Andrews v. Agricultural Relations Board*, 28 Cal. 3d 781 (1981). (Board Op. Br., p. 14)

California Supreme Court's decision in *Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781 (1981), and urged reversal on the grounds of *Andrews*. Thus petitioners argued that *Andrews* "overruled" *American Motors* (49er Op. Br., pp. 7-10; Board Op. Br., pp. 12-15; Intervenors Op. Br., pp. 15-16) and that it provided the "crucial" statement of "the current California law . . . ." (Intervenors Op. Br., p. 15; Intervenors Reply Br., p. 2)[5] The court of appeal squarely rejected that state law argument (Board Pet., pp. A-9, A-10; 146 Cal. App. 3d at 540), and the fact that it did so without even mentioning Intervenors' federal arguments makes clear that the decision below rests on state law.[6]

III. THE CONSTITUTIONAL ISSUE RAISES NO QUESTION WORTHY OF THIS COURT'S REVIEW.

This Court has recently addressed the due process principles relevant to this case on several occasions.[7] Those cases have established a clear body of law for the lower courts to apply. Petitioners do not claim otherwise.

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[5] Given petitioners' heavy reliance on *Andrews*, their criticism of the lower court for citing that case—saying that it is not "on point"—is amazing. (Board Pet., p. 6; Intervenors Pet., p. 6)

[6] 49er's petition also asks this Court to decide whether the lower court properly ruled on its claim respecting the challenge procedures under California Administrative Code, Title 13, Section 551. (49er Pet., pp. 10-13) That, of course, is not a federal question over which this Court would have jurisdiction.

[7] *Gibson v. Berryhill*, 411 U.S. 564 (1973) (because of possible pecuniary interest in outcome, optometrists in private practice could not adjudicate whether it was unlawful for optometrist to practice as a salaried employee of a corporation); *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976) (school board members may participate in decisions to terminate teachers because they did not have the kind of personal or financial stake in the decision that would create a conflict of interest); *Friedman v. Rogers*, 440 U.S. 1 (1979) (optometrist who adhered to the "commercial" practice of optometry had no right to be regulated by a board sympathetic to the commercial practice of optometry but did have a right to fair and impartial hearing in any disciplinary proceedings conducted against him by state optometry board); *Withrow v. Larkin*, 421 U.S. 35 (1975) (board with both investigatory and adjudicatory functions not biased); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (mayor cannot be impartial judge where he is responsible for village finances, and court fines, fees, and costs provide a substantial portion of village funds); see also *Wall v. American Optometric Ass'n*, 379 F.Supp. 175 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).

Instead, petitioners attack both the decision below and its California predecessor, *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977), as aberrations, saying that they reflect a "neglectful approach" and that they are "clearly wrong under all applicable precedents" and are "close to an [sic] usurpation of power. . . ." (Intervenors Pet., p. 14) Thus the petitions, assuming their accusations to be correct, by their own admission raise no important, undecided issue of law; they simply ask the Court to change what they perceive to be a "clearly wrong" decision in this particular case. But this Court sits to decide "special and important" issues, Rule 17.1; it "does not sit for the benefit of particular litigants . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932).

And that is not all. There are additional reasons why this case presents no occasion for consideration of the constitutional issue, even assuming more guidance from this Court were needed. We establish that next, turning first to the ruling that the dealer members have an economic stake in adjudicating dealer termination cases and second to the ruling that their nonvoting participation in the decision making process violates due process.

A. The Holding That The Dealer Members Have An Economic Stake.

A legislature cannot create an adjudicatory administrative agency and then allow those with an economic stake in the outcome to be adjudicators. That is well settled. See, *e.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781, 793 n.5 (1981); *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d 648, 657 (1980). The courts below applied that settled principle to the particular statutory scheme and adverse economic interests here involved and held that the Board's dealer members, whose own franchises can be terminated only for "good cause", have a personal, economic interest in adjudications which decide whether a manufacturer has proved "good cause" for termination. (Board Pet., pp. A-5, A-9, A-10; 146 Cal. App. 3d at 537, 540-41) Petitioners' claim

that the lower courts' conclusion was in error raises no issue worthy of this Court's review for the following additional reasons:

1. *Issue previously decided.*

First, the decision below rests on the prior California decision of *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977). And petitioners concede that what they ask this Court to review is *American Motors*, saying that it was wrong and that this Court should "correct" it. (Board Pet., pp. 8-10; Intervenors Pet., pp. 9-21; 49er Pet., pp. 5-9) But *American Motors* is a seven year old case against the Board[8] in which there was no petition to this Court and to which the California legislature responded by amending the statute to remove the dealer members' voting presence. (See pp. 3-4, above) Thus in California, the dealer members' economic stake in adjudicating dealer termination cases is something which is long behind us.

2. *No impact beyond this Board.*

Second, a decision by this Court on whether the dealer members have an economic stake in adjudicating dealer termination cases under California's particular statute would have little, if any, impact beyond this case, even assuming it would have an impact in this case. (See Part I, above) As the Board admits, "[d]ue process is a flexible concept" which "must be determined from the peculiar facts of each individual case." (Board Pet., p. 11) Although petitioners say that other states have agencies which deal with manufacturer-dealer relations and that other state courts have upheld those statutes (Board Pet., pp. 8-9; Intervenors Pet., pp. 11, 19, 22-23), they do not and cannot say that the statutes are the same, that the legislative histories establish that their purpose was to evade prior state court rulings or that the constitutional challenges

[8] Intervenors were not parties to *American Motors*. They were, however, amici. See *American Motors Sales Corp. v. New Motor Vehicle Board*, 69 Cal. App. 3d 983 (1977).

involved in the cases on which petitioners rely were the same as that decided below.[9]

Intervenors also say that "hundreds, if not thousands" of regulatory agencies include members of the regulated profession (Intervenors Pet., p. 11), apparently thereby intending to imply that the decision below will impact the viability of those agencies. But neither *American Motors* nor the decision below in any way questions participation by the regulated in an agency's rulemaking functions. To the contrary, both decisions distinguish that situation and make clear that their holding applies only to adjudicatory functions where the agency is adjudicating concrete disputes in which its members have an economic interest. *American Motors*, 69 Cal. App. 3d at 992 n.7; Board Pet., p. A-11; 146 Cal. App. 3d at 541. The lower court was hardly departing from settled due process principles in articulating a difference between an agency's legislative and adjudicatory functions. See *Friedman v. Rogers*, 440 U.S. 1, 18-19 (1979); *Concerned Citizens v. Pine Creek District*, 429 U.S.

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[9] Petitioners cite three cases from other states which they say are contrary to the California law as laid down by *American Motors* and the decision below. (Board Pet., p. 9; Intervenors Pet., pp. 18-19) The first is *Ford Motor Co. v. Pace*, 335 S.W.2d 360, 367 (Tenn.), *app. dismissed, Ford Motor Co. v. Pace*, 364 U.S. 444 (1960). But *Pace* involved a statute under which an agency could revoke a manufacturer's license for improper conduct vis-a-vis its dealers; it did not permit the agency to adjudicate particular private disputes. See Tennessee Code Annotated § 55-17-114. Moreover, *Pace* was a declaratory judgment action seeking invalidation of a dealer board for all purposes and without regard to the function it was performing. The court rejected that broad attack, observing that regulatory agencies are commonly composed of those from the regulated profession. 335 S.W.2d at 367. The court below and the *American Motors* court recognized that principle and correctly held it inapplicable here, where the agency's adjudicatory, not rulemaking, functions are involved. *American Motors*, 69 Cal. App. 3d at 992 n.7; Board Pet., p. A-10; 146 Cal. App. 3d at 540-541.

General Motors Corp. v. Capitol Chevrolet Co., 645 S.W.2d 230 (Tenn. 1983), simply reiterates *Pace*, 645 S.W.2d at 232, and it is not persuasive here for the same reasons.

General GMC Trucks, Inc. v. General Motors Corp., 237 S.E.2d 194, *cert. denied*, 434 U.S. 996 (Ga. 1977), involved the agency's decision to deny a license for a dealer to operate in a new, already serviced trade area. The decision therefore concerned the agency's essentially regulatory function of controlling the dealer's ability to expand its operations—an issue as to which the interests of dealers and manufacturers are not inherently adverse. The Georgia court explicitly limited its holding to the agency's function there involved. 237 S.E.2d at 195.

651, 656-57 (1977) (Rehnquist, dissenting); *Wall v. American Optometric Ass'n*, 379 F.Supp. 175, 180, 188-89 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).

In short, the lower courts applied the correct constitutional principles to this case. Their conclusion that the dealer members' economic interest was constitutionally unacceptable depended on the "peculiar facts" respecting this statute, including the fact that there has been a "long history of legal warfare" between automobile manufacturers and their dealers over franchise operations. *American Motors*, 69 Cal. App. 3d at 986. It is not this Court's function to second-guess that application. As the Court put it in *Gibson v. Berryhill:*

> ". . . applying the standards taken from our cases, [the District Court] concluded that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no reason on this record to overturn its conclusion . . . ." 411 U.S. at 579.

3. *Decision clearly correct.*

Third, *American Motors* and the decision below are clearly correct. This is not the occasion to argue the merits, but because petitioners rely primarily on their views respecting the merits (Intervenors Pet., pp. 9-21; Board Pet., pp. 8-10; 49er Pet., pp. 5-9), we respond briefly:

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court held unconstitutional a statute authorizing a board of optometry consisting of optometrists in private practice for their own account to adjudicate whether it was unprofessional conduct or unlawful for an optometrist to practice as a salaried employee of a corporation. 411 U.S. at 567, 579. In so holding, this Court did not require proof that money would directly pass into the adjudicators' pockets as a result of the particular decision they were then making, 411 U.S. at 578-79, and thereby rejected what appears to be petitioners' merits argument here. (See Intervenors Pet., pp. 12-21; Board Pet., p. 9; 49er Pet., pp. 5-9)

See also *Wall v. American Optometric Ass'n*, 379 F.Supp. 175, 188-89 (N.D. Ga.), *aff'd summarily sub nom., Wall v. Hardwick*, 419 U.S. 888 (1974).[10] Nor are other federal decisions to the contrary. Each addresses a different issue in a different context.[11]

Finally, all of petitioners' federal arguments were made to the court below; the fact that it held as it did without even discussing those federal authorities only proves that its decision rested on California constitutional principles. (See Part II, above)

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[10] The Board suggests that a dealer member may, in some case, also be biased against the particular dealer which comes before the Board. (Board Pet., p. 9) Such individualized bias is the type which must be specially shown and is what the Board's challenge procedures are all about. (Board Pet., pp 7-8; 49er Pet., pp. 10-13) But the possibility of such individualized bias against a particular dealer hardly negates the dealer members' personal economic interest in all dealer termination cases.

Intervenors refer to some extra-record statistics respecting the Board's rulings on dealer terminations (Section 3060 hearings) and additions or relocations of dealers. (Section 3062 hearings) (Intervenors Pet., p. 9, n.9) But due process is violated when an adjudicator has an economic interest; a party challanging that interest need not establish that the adjudicator's voting record was against him. If that were the standard, this Court would be required to readjudicate the merits of all of the cases which came before the Board to determine whether the Board decided them correctly.

[11] Intervenors say that *Friedman v. Rogers*, 440 U.S. 1 (1979) "directly overruled" *American Motors*. (Intervenors Pet., p. 13) But there this Court held that Texas could require a majority of its optometry board to be members of an association which supported the state's legislatively enacted rules. 440 U.S. at 17-18. The Court made clear that its holding related to an agency's rulemaking, and not to its adjudicatory, functions. 440 U.S. at 18.

49er claims that it was *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), which "overruled" *American Motors*. (49er Pet., p. 9) That is wrong too. There this Court held constitutional the Vehicle Code's provision which temporarily prevented a manufacturer from acting pending a Board hearing. The Court made clear that the statute would be constitutional only if the Board were an "impartial tribunal", 439 U.S. at 107-08—an issue which was not before it and which it did not decide.

Both Intervenors and the Board also rely on *Withrow v. Larkin*, 421 U.S. 35 (1975), and *Hortonville District v. Hortonville Association*, 426 U.S. 482 (1976). (Board Pet., pp. 7-8; Intervenors Pet., pp. 12-13) But neither of those cases dictates reversal. *Withrow* held that a board with both investigatory and adjudicatory functions was not biased because "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55. That has nothing to do with a case like this where

(footnote continued on following page)

B. Nonvoting Participation by Those With An Interest Violates Due Process.

As the Board notes, the statute *American Motors* struck down provided for the dealer members' voting participation in dealer termination cases. (Board Pet., p. 9) Following *American Motors* the legislature first amended the statute to eliminate dealer participation and then reamended it to grant dealer members full participation in the decision making process so long as they did not formally vote. (pp. 3-4, above) The second amendment was introduced because the Board said it lacked the capacity to decide dealer termination disputes without the dealer members' participation, and the legislature made clear that it was enacted so that the dealer members' influence could be "utilized in the decision making process of the board." Cal. Stats. 1979, Ch. 340, § 3; Senate Transportation Committee Analysis of S.B. 417 (1979); Assembly Transportation Committee Analysis of S.B. 417 (1979).

The lower courts held that the dealer members' nonvoting participation in the deliberative process violated due process. As the court of appeal explained, the dealer members

> "are permitted to participate actively in hearings on dealer-manufacturer disputes, hear evidence, and comment upon and advise other Board members in such matters. In other

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(footnote continued from previous page)

the Board members have a personal economic stake in the outcome and this Court said so. *Id.* at 47.

Hortonville related to a school board's action as manager of the school district, which this Court expressly said "was not an adjudicatory decision." 426 U.S. at 495. While the board members may have had a point of view by reason of their being managers, this Court also expressly held that they did not have a "personal or financial stake in the decision", 426 U.S. at 491-92, as the dealer members were held to have here under California law. It is the distinction between a "point of view" and an "economic stake" which makes the petitioners' circuit court cases inapplicable as well. See *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974) (adjudicator said to be too "management oriented"); *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500 (Ct. Cl. 1977) (tribunal claimed to be biased because majority was employed by Travelers Insurance Company and would therefore assertedly favor the government (not Travelers, a nonparty)); *Wolkenstein v. Reville*, 694 F.2d 35 (2d Cir. 1982), *cert. denied, Wolkenstein v. Reville*, 103 S.Ct. 2452 (1983) (school superintendent said to have an "official motive" against teachers).

Finally, Intervenors cite *Smith v. Phillips*, 455 U.S. 209 (1982). (Intervenors Pet., p. 16) That case concerned juror misconduct—a challenge which, unlike economic interest, requires proof of actual bias. 455 U.S. at 215.

words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process." (Board Pet., p. A-10, A-11; 146 Cal. App. 3d at 541)

Although the Board's petition makes passing reference to that aspect of the court of appeal's decision (Board Pet., pp. 9-10), neither it nor the other petitions presents any reason for this Court to grant a writ with respect to it. Accordingly, we do not address the point further other than to note:

1. Due process demands that adjudicatory decisions be impartial. If a member of an adjudicatory tribunal has an interest in the case, that member cannot participate at all even if he or she does not vote. If the interested member did participate, he or she would influence the voting members; the member's economic interest would become a part of the decision making process; and the adjudication would no longer be impartial.

2. California law clearly establishes that members of an adjudicatory tribunal influence each other and that all must be qualified to vote. See *Moles v. The Regents of the University of California*, 32 Cal. 3d 867, 874 (1982) (participation by justice who did not hear oral argument invalidates decision even though his vote was unnecessary to decision because of his ability to influence the other panel members); *Applebaum v. Board of Directors of Barton Memorial Hospital*, 104 Cal. App. 3d 648, 659-60 (1980) (adjudicatory decision by agency invalidated where doctor who initiated charges sat on board but did not vote); *Commission on California State Government Organization & Economy v. Fair Political Practices Committee*, 75 Cal. App. 3d 716, 722 (1977) (nonvoting commission members who were in "solely advisory" capacity were subject to conflict of interest laws because in "real life" they were capable of directly altering the decisions of executive agencies). Indeed, the *only* law cited to the court of appeal on this subject was California, not federal.

CONCLUSION

The petitions should be denied.

Dated: February 17, 1984.

Respectfully submitted,

McCutchen, Doyle, Brown
& Enersen

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General Motors Corporation

LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28

The undersigned, counsel of record for Respondent Chevrolet Motor Division, General Motors Corporation, certifies that all of respondent's United States and Canadian subsidiaries are wholly owned except Motor Enterprises, Inc., which is owned in part by the United States Small Business Administration.

Richard C. Brautigam
Counsel of Record
for Respondent

APPENDIX A

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of 49ER CHEVROLET, *Protestant,* VS. CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION, *Respondent.*	**Protest No. PR-271-80** **ORDER OF DISMISSAL**

PURSUANT TO THE Minute Order dated July 31, 1981, and Judgment dated August 20, 1981, of the Honorable Frank W. Shaw, Judge of the Superior Court of the State of California, City and County of San Francisco, in the matter of *Chevrolet Motor Division, General Motors Corporation* vs. *New Motor Vehicle Board;* 49er Chevrolet, Real Party in Interest; Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc., Additional Real Parties in Interest (San Francisco Superior Court No. 777974) *(49er Chevrolet* vs. *Chevrolet Motor Division, General Motors Corporation,* Protest No. PR-271-80), the New Motor Vehicle Board hereby sets aside its Decision of January 28, 1981, rendered in the above-entitled Protest, and dismisses said Protest for lack of jurisdiction.

DATED: January 5, 1984

NEW MOTOR VEHICLE BOARD

By ROBERT J. BECKUS

Robert J. Beckus
Public Member
New Motor Vehicle Board

Court of Appeal of the State of California

in and for the

First Appellate District

Division Three

49ER CHEVROLET, et al., *Petitioners,* vs. The NEW MOTOR VEHICLE BOARD, *Respondent,*	**No. A025621 San Francisco Superior Court No. 777974**

GENERAL MOTOR DIVISION
GENERAL MOTORS CORPORATION,
Real Party in Interest.

BY THE COURT:

Petitioner's request for a stay is denied. Petitioner to advise this court of the results in 49er Chevrolet v. New Motor Vehicle Board, 3 Civ. 23426, when that appeal to the Third District of the Court of Appeal has been resolved.

WHITE, P. J.

_____ P. J.

Dated JAN 20 1984